United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

949

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,583

UNITED STATES OF AMERICA

v.

DAVID L. WILLIAMS,

Appellant.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

WALTER E. GILLCRIST,
900 Fifteenth Street, N.W.
Washington, D.C. 20005

Attorney for Appellant.

I N D E X

TABLE OF CASES

STATUTES

Federal Youth Corrections Act:

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,583

UNITED STATES OF AMERICA

v.

DAVID L. WILLIAMS,

Appellant.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Is the United States District Court, when imposing sentence on a defendant pursuant to 18 U.S.C. § 5010(c), to a term in excess of the provisions of 18 U.S.C. § 5010(b), required to make findings of fact and conclusions of law that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction?

This cause has not been previously before this Court under the same or similar title.

REFERENCES AND RULINGS

Defendant, having been convicted on a five-count indictment, was sentenced by the United States District Court on August 15, 1969, pursuant to 18 U.S.C. § 5010(c), for a period of eight years, pursuant to the provisions of the Federal Youth Corrections Act (A.). A motion to vacate judgment and correct sentence imposed was filed by defendant, and denied without opinion by the Court (A.). There were no findings of fact or conclusions of law made by the Trial Court at time of sentencing, and no oral or written opinion or memorandum was filed by the Court.

STATEMENT OF THE CASE

The defendant, David L. Williams, and Charles N. Keener, were indicted by a Grand Jury and charged in a seven-count indictment with armed robbery, robbery, assault with a dangerous weapon, assault on a member of a police force with a dangerous weapon, and carrying a

dangerous weapon, all in violation of 22 D.C. Code §§ 2901, 3202, 502, 505(b), and 3204 (A.). Five of the counts involved the defendant David L. Williams.[1/] Prior to trial Charles N. Keener became deceased.

The evidence adduced at trial, which is not material to the disposition of the issues raised in this appeal, showed that Charles N. Keener, by use of a pistol, robbed High's Grocery Store in the shopping center adjacent to Pennsylvania Avenue and Branch Avenue, S.E., Washington, D.C., on December 22, 1968. While Mr. Keener was in the High's Grocery Store Francis A. Tipping, Jr., a Metropolitan Police Department officer, off duty, emerged from his automobile at the shopping center; noted the defendant, David L. Williams, standing in the parking lot in front of High's Grocery Store; became suspicious; caused the Police Department to be notified; and approached Mr. Williams.

As Officer Tipping began to question the defendant David L. Williams, the defendant Charles N. Keener emerged

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1/ Only the defendant Charles N. Keener was charged with assault on a member of the Police Force with a dangerous weapon.

from High's Grocery Store, carrying a paper bag. Mr. Williams had already advised Officer Tipping that he was waiting for a friend in the store. As the defendant Keener approached, Officer Tipping inquired of Mr. Williams whether Mr. Keener (who was apparently unknown to Officer Tipping) was the friend. At that point, Mr. Keener was only several feet from Officer Tipping. Mr. Keener drew a pistol and fired point-blank at the police officer. Fortunately, the weapon misfired. The defendant Keener turned and ran, and was simultaneously shot by the police officer, who fired through his pocket. 2/

The defendant Williams did not run and offered no resistance to the police officer. 3/

A pistol was found in the pocket of defendant Williams's outer coat. At no time did the defendant Williams attempt to draw or use the pistol.

2/ The defendant Keener did not become deceased as a result of the wound inflicted by the police officer.

3/ Although the defendant Williams was thrown to the ground by Officer Tipping, the latter testified that he offered no resistance.

The defendant Williams, testifying in his own behalf, stated that he took an automobile ride with the defendant Keener and a third party named Green. The purpose of the automobile ride was initially to drive around for a short while and then drive the defendant Williams to his place of employment on Wisconsin Avenue, N.W., Washington, D.C. Mr. Williams, then age eighteen, stated that Mr. Green parked the automobile adjacent to the aforesaid shopping center; and that Mr. Keener demanded that he, Williams, exchange outer coats, which was done. He testified that he was told to go up to the parking lot. Williams stated that he did not know that Keener was going to rob High's Grocery Store; that he was afraid of both Keener and Green and was unable to run away. He therefore merely stood in the parking lot.

Trial was had before the Honorable June Green, United States District Judge, on June 17 and 18, 1969. The jury returned a verdict of guilty on each of the five counts in which the defendant Williams was involved.

Prior to trial it had been ascertained by counsel for the defendant Williams and the Assistant United

States Attorney prosecuting the case that the defendant, David L. Williams, had no police record, including juvenile records. 4/

The defendant was sentenced under the Federal Youth Corrections Act, 18 U.S.C. § 5010(c), to a term of eight years. No findings of fact or conclusions of law were either orally or in writing stated or filed by the Court, indicating in any fashion that the defendant Williams might not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of his conviction. Defendant's motion to vacate judgment and correct sentence imposed was denied by the Court (A.). From this judgment defendant appeals.

STATUTES INVOLVED

The Federal Youth Corrections Act, 18 U.S.C. § 5010, provides:

> § 5010. Sentence
>
> (a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

4/ There was some doubt as to the existence of juvenile records because of the defendant's common name. However, it was subsequently ascertained, prior to trial, that the defendant had no juvenile record.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017(d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings.

ARGUMENT

The defendant, David L. Williams, who had never been in any trouble with the law except the instant case, was

sentenced by the Trial Court under the Youth Corrections Act, § 5010(c) rather than § 5010(b). The term imposed was eight years.

The purpose of the statute was to permit federal judges in their discretion to sentence and treat youth offenders in line with modern trends in penology, which stress correctional rehabilitation rather than retributive punishment. Frye v. Moran, 302 F. Supp. 1291 at 1294 (W.D. Tex., 1969).

When imposing sentence under the Youth Corrections Act, three alternatives are possible. Under 18 U.S.C. § 5010(a), the Court may place the youth offender on probation. No findings of fact are necessary thereunder. Cherry v. United States, 299 F.2d 325 at 326 (9th Cir., 1962). Under § 5010(b) the Court may sentence the youth offender to the custody of the Attorney General for treatment and supervision until discharged by the Division. Such a sentence requires the youth offender to be released conditionally under supervision on or before the expiration of four years from the date of his conviction, and unconditionally discharged on or before six years from the date of his conviction. 18 U.S.C. § 5017(c). A sentence imposed under 18 U.S.C. § 5010(b)

requires the Court to make findings that the convicted person is a youth offender and the offense is punishable by imprisonment under applicable provisions of law other than that subsection. Cherry v. United States, supra; Rogers v. United States, 326 F.2d 56 at 58 (10th Cir., 1963); cf. Standley v. United States, 318 F.2d 700 (9th Cir., 1963).

In Rogers v. United States, supra, construing 18 U.S.C. § 5010(b), the Circuit Court held that that subsection requires and makes mandatory two preliminary findings by the Court before a sentence may be imposed under the Youth Corrections Act. The Court rejected appellee's argument that these findings are to be implied from the fact that the sentence was pronounced under the Act. The Circuit Court held that either the judgment of commitment recite the sentence imposed under the Act, or the reporter's record of the proceedings must affirmatively show that the sentencing judge, prior to the imposition of the sentence, made such findings. "In other words, the record as a whole must show a valid sentence was imposed and if a sentence is pronounced under the Federal Youth Corrections Act without the finding of these basic facts, the sentence is without foundation of law." 5/

5/ Rogers v. United States, 326 F.2d 56 at 58 (10th Cir., 1963).

The third alternative, which the Trial Court utilized in the instant case, permits the youth offender to be sentenced to the custody of the Attorney General for treatment and supervision for any further period that may be authorized by law for the offense or offenses of which he stands convicted. 18 U.S.C. § 5010(c). Under such a sentence the youth offender shall be released conditionally under supervision, not later than two years before the expiration of the term imposed by the Court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed. 18 U.S.C. § 5017(d).

The statute clearly delineates that sentence may be imposed under 18 U.S.C. § 5010(c) if the Court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction. This is clearly a conclusion of law, or at least an objective conclusion which must be predicated upon a factual basis. Bearing in mind that the purpose of the statute is rehabilitation rather than punishment, it is difficult to ascertain what basis, if any, the

Trial Court utilized in imposing the sentence in the instant case. If the probation report contained information which formed the Court's predicate, then that information ought to have been made available to defendant so that he could test the content thereof. It would seem improbable that the Court predicated its sentence and its apparent determination that the youth offender would not be able to derive maximum benefit from treatment simply on the basis that he was caught with a pistol in his pocket.

In the instant case, the Trial Court did not make the findings of fact which the statute manifestly requires. Certainly, if findings of fact are required under 18 U.S.C. § 5010(b), there is a greater need for findings of fact under subsection (c) of that statute. Such findings, of course, must lay a proper foundation for the conclusion that the youth offender will not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of his conviction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the United States District

Court for the District of Columbia should be vacated and the cause remanded for resentencing in conformity with 18 U.S.C. § 5010.

WALTER E. GILLCRIST
Attorney for Defendant-Appellant
900 Fifteenth Street, N.W.
Washington, D.C. 20005

MAY, 1971

CERTIFICATE OF SERVICE

I certify that on May 19, 1971, I served the foregoing brief by mailing a Xeroxed copy thereof postage prepaid, as follows: Thomas Flannery, Esquire, United States Attorney for the District of Columbia, United States Courthouse, Third and Constitution Avenue, N.W., Washington, D.C. 20001.

WALTER E. GILLCRIST

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,583

UNITED STATES OF AMERICA, APPELLEE

v.

DAVID L. WILLIAMS, APPELLANT

Appeal from the United States District Court for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
CHARLES R. WORK,
ROGER M. ADELMAN,
Assistant United States Attorneys.

Cr. No. 299-69

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TABLE OF CASES

OTHER REFERENCES

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* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED*

In the opinion of appellee, the following issue is presented:

Whether the District Judge properly sentenced appellant under section 5010 (c) rather than section 5010 (b) of the Federal Youth Corrections Act?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,583

UNITED STATES OF AMERICA, APPELLEE

v.

DAVID L. WILLIAMS, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In an indictment filed on February 25, 1969, appellant was charged with single counts of armed robbery, robbery, and carrying a dangerous weapon, and two counts of assault with a dangerous weapon, in violation of 22 D.C. Code §§ 3202, 2901, 502 and 3204, respectively.[1] He was tried before Judge June L. Green and a jury on June 17 and 18, 1969. He was found guilty

[1] The indictment also charged Charles Keener with these offenses and also with one count of assault on a police officer while armed, in violation of 22 D.C. Code § 505. Keener died shortly after the indictment was returned, and the case as to him was dismissed.

on the counts charging armed robbery and carrying a dangerous weapon and the two counts charging assault with a dangerous weapon. On August 15, 1969, Judge Green sentenced appellant to a term of eight years under the Federal Youth Corrections Act, 18 U.S.C. § 5010 (c). This appeal followed.

The Trial [2]

At about 8:00 p.m. on December 22, 1968, a man subsequently identified as Charles Keener entered the High's store located in the Penn-Branch Shopping Center in Southeast Washington. There were at least ten customers in the store, along with two High's employees, Gladys Guptill and Maggie Fennell. Keener picked up two bottles of soda but told Miss Fennell that he had no money with him and said he was going out to his car to get some. A few moments later [3] he reappeared. Instead of money, he produced a pistol and announced a holdup. He trained the pistol on both of the employees and ordered Miss Fennell to fill a paper bag with money. After she put about $65 in bills into the bag, Keener grabbed it and put a loaf of bread in it on top of the money. He backed out of the door, warning the people inside not to move for five minutes (Tr. 6-8, 10, 16-20).

While Keener was occupied in the High's store, Officer Francis Tipping of the Metropolitan Police drove into the parking area in front of the shopping center. Tipping was off duty and in civilian clothes. He was un-

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[2] The ensuing description of the events testified to at trial is somewhat longer than we ordinarily would present in a case such as this, where the only assignment of error relates to the manner in which the sentence was imposed. However, since appellant's statement of the case is not based on the transcript (which he did not seek to have prepared) but apparently only on his counsel's recollection of the trial (the same counsel who represented appellant at trial represents him here), we feel obligated to provide the Court with a fuller statement of the case than might otherwise be necessary.

[3] Miss Fennell recalled that she was able to wait on two customers in the interim (Tr. 16).

aware of what was taking place in the High's store a few doors away from the spot where he parked. But something did arouse his attention. He noticed appellant standing in the parking area directly in front of the High's store. Appellant, in the officer's words, was "looking around in different directions, up and down Pennsylvania Avenue" (Tr. 51), and had his trench coat pulled up waist-high with his hands in his pockets. It was raining at the time, and Tipping thought it was unusual for someone to be standing out in such weather without any apparent innocent purpose. Although a quick glance into the High's store revealed nothing unusual, Tipping decided to check appellant out. He took two precautions. First, he went inside a drug store in the shopping center and called the police dispatcher for a backup unit.[4] Second, he took his service revolver from his shoulder holster and placed it in his trench coat pocket where it would be easier to reach (Tr. 51-52, 75).

Tipping was in the drug store for about three minutes. When he came out, he saw that appellant had moved from the parking lot onto the sidewalk in front of the High's store. He walked up to appellant, identified himself as a policeman, and asked him for identification.[5] Appellant responded that he was "waiting for a friend."[6] As appellant reached into his coat to get his identification, Keener, carrying his bag of loot, stepped out of the High's store and walked down the sidewalk behind appellant and the officer. Tipping, who was facing toward Keener, asked appellant if that was his friend. Appel-

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[4] Officer Tipping told Ralph Rufino, one of the drug store employees, that there might be a holdup going on at High's (Tr. 52). Rufino testified that Tipping asked him to watch from the front of the store when he approached appellant, and to call the precinct for assistance if necessary (Tr. 29).

[5] Officer Tipping, who regularly patrolled that part of Southeast Washington, had previously seen appellant in the area but apparently did not know his identity (see Tr. 63-64).

[6] Appellant corroborated this statement in his own testimony. See Tr. 166.

lant looked over his shoulder and told Officer Tipping, "Yeah, that's him" (Tr. 67). Tipping yelled to Keener, who was walking rapidly, to stop and as he did so Tipping identified himself. Keener, who by this time was almost directly in front of the pair, turned, pulled out a pistol and fired point blank at Tipping.[7] His shot missed, and Tipping was able to fire three shots quickly at Keener, at least one of which took effect. His pistol jammed after the third shot, and Keener limped off toward Branch Avenue.[8] Appellant then broke and ran in the opposite direction. Officer Tipping grabbed him by the collar and, after a short struggle,[9] threw appellant to the ground. He quickly handcuffed appellant. As he was doing so he saw a .22 caliber pistol in the waistband of appellant's trousers and quickly seized it. Keener made good his getaway in a car driven by another confederate in the robbery but was arrested later that evening at the Prince George's County Hospital, where he was seeking treatment for his gunshot wounds.[10] (Tr. 55-61, 65, 67-68, 71, 73, 77-78.)

Appellant's defense appeared to be a blending of duress and mistake of fact. He claimed that Keener persuaded him to leave his home and go with him at about noon, eight hours before the robbery. In the intervening hours,

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[7] Officer Tipping testified that Keener was two or three feet from him when he fired (Tr. 72; see also Tr. 68).

[8] He dropped his pistol on the parking lot near Branch Avenue, where it was recovered by Mr. William Hood, who witnessed the gunfight from the sidewalk along Pennsylvania Avenue (Tr. 82-86).

[9] Mr. Rufino saw Keener and Officer Tipping exchange single shots, then turned and yelled into the drug store for someone to call the police (see note 4, *supra*). When he looked out again, appellant was struggling with Tipping, and to Rufino it appeared as if appellant had started this fray by "jumping on" Tipping (Tr. 29-33, 44, 48-49).

[10] He was apparently identified at that time by Officer Tipping (see Tr. 62). Keener died about a month and a half later from burns and gunshot wounds he suffered in an unrelated incident (Tr. 3, 62).

he and Keener drove in Keener's car to several different locations in Southeast, apparently trying to borrow money from friends. Appellant's testimony portrayed Keener as a narcotic addict entering withdrawal who was searching for money for a "fix." Keener was unsuccessful in obtaining money at any of the stops; all he could gather was a few dollars borrowed from appellant himself. Finally, at about 7:30 p.m. Keener picked up a man named Charles Green, who took the wheel and drove the three of them to Branch and Minnesota Avenues, adjacent to the Penn-Branch Shopping Center (Tr. 143-158). In the parked car Keener traded raincoats with appellant[11] and produced a pistol. Pointing it near appellant, Keener announced that he was going to "get something" at the High's store and that he wanted appellant to come with him.[12] Green then handed appellant a pistol. Appellant, though "scared," took the weapon and left the car. Although Keener said he was going to High's "to get something" (Tr. 160), appellant claimed he had no idea Keener was about to rob the store.[13] Nevertheless he followed Green's order to go with Keener.

While Keener reconnoitered the store, appellant paced the lot, still allegedly unaware that a robbery was in progress. Appellant claimed that he recognized Tipping as a police officer as soon as he entered the lot. But he did not flee—for two contradictory reasons: he was unaware that he was part of a robbery, and he was afraid to run because Green was watching him from a point near the car.[14] After Keener reappeared, appellant testified that he did indeed tell Tipping that he was the "friend" he had been waiting for. When the gunfire started, appellant claimed, he started away from Officer

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[11] He had apparently taken appellant's identification from him earlier in the afternoon. See Tr. 157.

[12] Moments earlier Keener, according to appellant, had told Green that they were going to get money to buy narcotics (Tr. 158).

[13] See Tr. 164-165.

[14] See Tr. 163-164.

Tipping in order to get out of the line of fire (Tr. 158-171).

On cross-examination appellant admitted that Green had told him to "get out and look for the police" (Tr. 175), but went on to testify that he did not tell Tipping that Keener was robbing the store because he did not know that Keener intended to rob the store. He also admitted that Green never displayed a gun, and that though he had several opportunities to flee during the afternoon and while Keener was in the store, he did not do so (Tr. 171-182).

ARGUMENT

Appellant was properly sentenced under section 5010 (c) of the Federal Youth Corrections Act.

(Tr. 171-182, 210-212; Sent. Tr. 2-5)

Appellant's sole contention on this appeal is his claim that the record does not bear sufficient indication that the trial judge found he was a suitable candidate for commitment under section 5010 (c), rather than section 5010 (b), of the Federal Youth Corrections Act (YCA).[16] We think that the manner of selecting this particular sentencing option was manifestly proper.

At the outset it should be borne in mind that appellant's complaint centers on a very narrow part of the sentencing judge's discretion. Unlike the situation in this Court's recent decisions in *United States* v. *Howard*,

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[16] 18 U.S.C. §§ 5005-5026. Appellant also suggests that the court did not find he was a "youth offender" or that he could be punished under another applicable statute. *See* 18 U.S.C. § 5010 (b). Though not strictly required for a commitment under section 5010 (c), both findings are, in any case, implicit in this record. The trial judge was told by defense counsel at sentencing that appellant was eighteen years of age at the time of the offense (he was sentenced eight months after the offense), and the court's remarks at sentencing reveal an awareness that appellant, convicted of armed robbery as well as carrying a dangerous weapon and assault with a dangerous weapon, could be sentenced under other provisions than the YCA (Sent. Tr. 2-5; see also Tr. 210-212).

D.C. Cir. No. 23,830, decided June 30, 1971, and *United States* v. *Waters*, 141 U.S. App. D.C. 289, 437 F.2d 722 (1970), the question here is not whether a straight-time sentence as compared with a YCA commitment should be imposed. It is merely whether the court should have ordered commitment under one part of the YCA rather than another. The crucial finding, according to *Howard* and *Waters*, is whether some sort of YCA commitment is appropriate.[16] Once that finding is made, as was done in this case, the thrust of *Waters* requiring that the sentencing court make a finding "either explicitly or implicitly" [17] of non-suitability for the YCA is satisfied. While a commitment under section 5010 (c) does require that the court find that the youth offender may not be able to derive maximum benefit from treatment before the expiration of six years, we think that the requirement for such a "finding," especially given the court's broader discretion in selecting an appropriate sentence within the YCA itself, can be satisfied by judging the court's actions here in the face of the record before it.

The record here clearly shows that the sentencing judge had determined that appellant might not derive maximum benefit from less than six years of rehabilitative treatment. She had, of course, heard the evidence of appellant's participation in an armed robbery. Despite appellant's inconsistent defenses of "duress" and mistake of fact, the judge was entitled to believe, as the jury obviously did, that he was a willing and active participant in the entire scheme. There is no other credible

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[16] *In United States* v. *Fort*, —— U.S. App. D.C. ——, ——, 443 F.2d 670, 688 (1970), *cert. denied*, 403 U.S. 932 (1971), this Court underscored the importance of this particular decision: "Certainly every judge who sentences a youth offender should seriously consider whether the offender is eligible for treatment under the Youth Correction Act. In most cases it is the preferred method of attempting to rehabilitate youth offenders."

[17] 141 U.S. App. D.C. at 292, 437 F.2d at 725.

explanation, for instance, for the fact that he did not try to dissociate himself from Keener although he had several opportunities to do so (see Tr. 171-182). Clearly a young man, no matter how unblemished his past might be,[18] who would wilfully take it upon himself not only to participate in an armed robbery by acting as a lookout but also to arm himself with a pistol (which was not necessary to perform his role as lookout) is one whom the court could fairly consider to be in need of extensive rehabilitative treatment.[19] The judge also noted that appellant as a convicted armed robber was not eligible for probation[20] and went on to note in effect that appellant was a dangerous individual.[21] In this circumstance, deterrence, a subsidiary consideration where a youthful offender is involved but nonetheless a viable one,[22] comes into play. As was recently pointed out by this Court in *Waters*, "the objective of deterrence may be taken into account by the trial judge, not by overriding the statute's rehabilitative provisions, but rather by combining them with a sentence exposing to a maximum term greater than that called for in subsection (b). This the trial court could have done by sentencing [the defendant] under subsection (c) . . . ." 141 U.S. App. D.C. at 293,

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[18] Defense counsel advised the court that appellant had no prior adult or juvenile record (Sent. Tr. 2).

[19] The court could also properly give consideration to appellant's association with Charles Keener, portrayed by him as a narcotic addict and also, apparently, as an experienced stickup man. It would certainly have been reasonable to conclude, as no doubt the sentencing judge did conclude, that extensive exposure to a different environment might be needed to cure appellant's proclivity for associating with people like Keener.

[20] Sent. Tr. 4. The judge was of course correct, since armed robbery is an offense punishable by life imprisonment under 22 D.C. Code § 3202 (a) (Supp. IV, 1971). Probation may not be given upon conviction of such an offense. 18 U.S.C. § 3651.

[21] See Sent Tr. 4-5.

[22] *See United States* v. *Waters*, *supra*, 141 U.S. App. D.C. at 293-294, 437 F.2d at 726-727.

437 F.2d at 726.[23] This was precisely the course which the court followed here, and it may reasonably be inferred that this section 5010 (c) sentence for an armed robber reflects the view that appellant might not be rehabilitated in the sense that he would be a law-abiding member of society until at least six years after his conviction.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment and sentence of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
CHARLES R. WORK,
ROGER M. ADELMAN,
Assistant United States Attorneys.

[23] See also footnote 18 of the *Waters* opinion, which sets out the explanation in the House Committee Report of the purpose of subsection (c). The quoted portion of the report stated in part: "[Section 5010 (c)] affords opportunity for the sentencing court to avail itself of the provisions of this bill and at the same time insure protection of the public if efforts at rehabilitation fail." H.R. REP. No. 2979, 81st Cong., 2d Sess. 4 (1950).

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